

## Feature Group IP

W. Scott McCollough  
General Counsel

1250 South Capital of Texas Highway  
Building Two, Suite 235  
Austin, Texas 78746  
December 31, 2008

512.888.1112 (V)  
512.692.2252 (FAX)  
scott@worldcall.net

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Room CY -B402  
Washington, D.C. 20554

RE: WC Docket No. 07-256; *FeatureGroup IP Petition For Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of The Commission's Rules*

Dear Ms. Dortch:

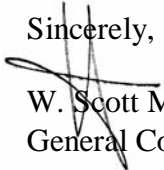
UTEX Communications Corp d/b/a FeatureGroup IP ("FeatureGroup IP"), the petitioner in WC Docket 07-256, is lodging the attached letter addressed to Joe A. Douglas, Vice President Government Relations, National Exchange Carrier Association, dated December 17, 2008 and received the same day by electronic mail.

The letter is being lodged with the Commission purely for the purpose of showing that FeatureGroup IP has attempted on several occasions to establish a dialogue with the incumbent telephone companies that control NECA to determine if some of the issues related to how Voice-Embedded IP-Enabled traffic could or should be signaled, routed and rated could be resolved through compromise. Despite FeatureGroup IP's best and good faith efforts, the incumbents have absolutely refused to negotiate or even substantively discuss the matter.

Even though FeatureGroup IP is an "Exchange Carrier" just like the incumbents, they have used the National Exchange Carrier Association to advocate one-sided and narrow-minded positions and results that favor incumbent LECs only, and are hostile to any different business models by other LECs like FeatureGroup IP. It is absolutely clear that the incumbents use NECA purely to advance their own interests and agenda, and they will not negotiate in good faith over the Voice-Embedded IP-Enabled issues involved in Docket 07-256. Indeed, it is now clear that the incumbents – individually and through NECA – are making arguments and basing their positions on counter-factual premises and they have no desire whatsoever to even consider whether some of their assertions and claims are false, even though FeatureGroup IP has extensively demonstrated their falsity and attempted to informally explain the matter to NECA.

FeatureGroup IP does not seek any action or relief from the Commission relating to the impermissible and improper NECA activities; that will be handled by a court of law. Nonetheless, their abject refusal to meet with a peer Local Exchange Carrier to exchange information or consider compromise on the matters before the Commission is relevant to and should be considered as part of the deliberations in Docket 07-256.

Sincerely,

  
W. Scott McCollough  
General Counsel, Feature Group IP

December 17, 2008

**VIA E-MAIL (jdouglas@neca.org)**

Mr. Joe A. Douglas  
Vice President, Government Relations  
NECA  
1401 K Street, NW, Suite 800  
Washington, D.C. 20005

**Re: Notice and Demand regarding impermissible and improper NECA activities**

Dear Mr. Douglas:

This firm represents UTEX Communications Corporation d/b/a Feature Group IP ("FGIP") in connection with litigation and potential litigation against incumbent LECs including but not limited to matters arising under the Sherman Act, 15 U.S.C. § 1, *et seq.* As you know, NECA's charter as defined under 47 C.F.R. § 69.601 is to "prepare and file access charge tariffs on behalf of all telephone companies ... ." Further, "the Association shall not engage in any activity that is not related to the preparation of access charge tariffs or the collection and distribution of access charge revenues ... unless such activity is expressly authorized by the Commission." 47 C.F.R. § 69.603.

FGIP believes that NECA, consisting largely of ILECs, has become the cover organization, if not the tool, of the ILECs to surreptitiously engage in a group boycott and conspiracy in restraint of trade. This boycott and conspiracy takes two forms. First, the ILECs, operating individually and through NECA refuse to provide "end user" PSTN connectivity to non-carrier VoIP providers under the ESP exemption. They instead insist that these non-carriers subscribe to access service notwithstanding that they are end users and expressly not subject to exchange access charges. Second, the ILECs, operating individually and through NECA, retaliate against and boycott other LECs (like FGIP) that do not participate in the boycott by, among other things, attempting to assess ILEC access charges against the competitive LEC and publicly asserting that the competitive LEC is engaging in illegal or improper activities.

Evidence of group boycott is multifold. NECA has engaged in a campaign to categorize all VoIP as "substitute services," a NECA-coined euphemism for those services and service providers that use new technology and new or different business models that are considered to compete with traditional telephone services and reduce the ILEC's perceived revenue entitlement. This position persists despite the ESP exemption contained in 47 C.F.R. § 69.5 and

even recent pronouncements that the FCC intends to treat VoIP traffic originating or terminating on the Internet as exempt from Access Charges. In presentations made to ILECs at various conferences, NECA has evidenced its intent to coordinate ILEC efforts to exclude VoIP providers from intercommunicating with the PSTN on any basis other than through access service. NECA formed a Demand Assurance & Network Analysis Group or "DANA" as set forth in a presentation by Mark Novy of NECA in the Summer of 2008. In the presentation, originally created in November of 2006 and authored by "zkhalem," Mr. Novy outlines that, beyond merely collecting access charges, NECA now has a mission to promote "demand assurance" and to avoid losing access demand to "substitute services," *i.e.* VoIP providers and the LECs that provide connectivity to them.<sup>1</sup>

The contents of one slide are illustrative of this cooperative, anti-competitive intent:

- Demand Assurance & Network Analysis Group ("DANA")
  - Three person group within Industry Relations
  - Directed by Bob Gnapp
  - Collecting and analyzing hard data
  - Training & awareness
- Collaboration among DANA, Regulatory, Legal, Tariff, and Technology departments
- ILEC industry needs to work together!

In its solicitation for additional ILEC participation in the NECA-sponsored boycott of Internet technology based service providers, NECA sent the following teaser to its members:

---

<sup>1</sup> Mark Novy, *Phantom Traffic and Access Avoidance* (2008), available at <http://www.telecomassn.org/conferences/2004/summer/2008NovyPhantomTraffic.ppt#6>.

## **Demand Assurance Conference** **July 23 & 24, 2008 – Minneapolis, MN**

**Join us for a 1½ day conference on phantom traffic & access avoidance**

[Register online](#) | [Agenda](#)

What is causing your company's access demand and revenue to drop? Certainly some of the loss can be explained by legitimate competition (e.g. wireless substitution), but have you ever wondered how much of your demand loss is associated with phantom traffic and other access avoidance schemes?

We're bringing together members, CABS and revenue assurance professionals and key industry players to discuss demand and revenue declines focusing on phantom traffic and access avoidance. You will have the opportunity to discuss your experiences and challenges associated with these serious and costly problems.

Learn about:

- State and federal regulatory efforts
- Effect of changing technology on demand
- Methods to quantify and mitigate phantom traffic
- Techniques to obtain fair interconnection agreements

You will also have the opportunity to share your own experiences and voice your ideas.

**When:** Wednesday, July 23, 2008 - 8:30 a.m. – 4:30 p.m. and Thursday, July 24, 2008 - 8:30 a.m. – Noon

**Where:** Millennium Hotel in downtown Minneapolis. Group rate of \$149 available until July 1, 2008. Ask for the **NECA** room block or use online code **NECAA**.

Millennium Hotel  
1313 Nicollet Mall  
Minneapolis, MN 55403-2697  
Reservations: 866-866-8086 or [www.millenniumhotels.com/millenniumminneapolis](http://www.millenniumhotels.com/millenniumminneapolis)

**Registration:** Registration for the conference is now open and seats are filling up fast. Don't miss your chance to be part of this event. There is no charge to attend this conference.

For more information contact NECA's Demand Assurance & Network Analysis team:

**Bob Gnapp**  
800-892-3322 x4415

**Mark Novy**  
800-892-3322 x4410

**Barbara Vrahnos**  
800-228-8597 x8487

Notably, the only “legitimate competition” recognized by NECA in this statement is that of wireless communication, further fostering the NECA meme that all VoIP is illegitimate phantom traffic or illegal arbitrage. In the course outline, NECA personnel spoke on issues antithetical to technology innovation in the communications arena, including topics such as the effect of technology on demand.<sup>2</sup> Finally, it appears that NECA is engaging in non-public

---

<sup>2</sup> Sal Talluto, Director, New Service and Technology Planning Group, at the NECA Expo: *Effect of Technology on Demand: Discussion of New Technologies and Their Current and Potential Effects on Demand* (Sept. 26, 2008).

coordination amongst its members specifically with respect to FGIP as evidenced by pages on its website (<http://www.neca.org>) responsive to search command "Feature Group IP" that are accessible only by members. That passworded file when searched on November 5, 2008 indicated a file size of 21509 bytes updated as of 10/25/2008 and on December 17, 2008 indicated a file size of 21509 bytes updated as of 11/20/2008, indicating that NECA creates a monthly report concerning my client that is not accessible to the public nor part of any regulatory function.

A group boycott is *per se* illegal under the Sherman Act and is not protected by the *Noerr-Pennington* doctrine if anticompetitive harm is a result of private, not public action. *E.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (The *Noerr-Pennington* doctrine exempts only speech promoting government-sponsored harm and not private actor anticompetitive harm); *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 412 (5th Cir. 2007) (group boycott or concerted refusal to deal). Evidence of NECA members' refusal to deal is rampant in FGIP's case. FGIP sent dozens of letters ILECs of which a vast majority were NECA members offering to directly interconnect under the FCC prescribed rate of \$0.0007 on a bill and keep basis via SIP, SS7 or ISDN PRI for the mutual exchange of traffic. In most cases involving a NECA member, the request was ignored or rejected.. These facts coupled with NECA's coordination efforts with its members to foster access "demand assurance" rather than merely access charge collection, *ultra vires* of its FCC charter, strongly suggest that NECA is engaged in an impermissible group boycott, among other possible antitrust violations.

In connection with various of the NECA sponsored presentations to its members and in non-protected public statements, NECA attempts to paint FGIP as engaging in phantom traffic or arbitrage activities. NECA knows that this is patently false. FGIP's business model functions under a unique but publicly-filed FCC tariff that is designed to serve a specific type of user that did not exist in 1996. On two occasions, FGIP sought to engage NECA in an attempt to devise mutually-agreed technical solutions to prevent phantom traffic or any other kind of access avoidance behavior by IXC's. Specifically, FGIP offered the following:

We meet at agreed upon points to exchange the bearer portion of traffic that will be exchanged between the RLECs' networks and our network. We suggest that this can be done at each of 5 regional exchange points, established in existing "carrier hotels." We propose that this occur in Chicago, Dallas, Los Angeles, Miami and New York but are willing to consider other locations. The exchange of bearer traffic can occur in either "TDM" or IP format. If an RLEC prefers to have an exchange point within its own territory, then FeatureGroup IP would be willing to do so, if the RLEC provides a location for us to install a gateway and gives us Internet access at that location.

The parties signal to each other using SS-7 B-Links, with each party paying its own way. If an RLEC does not have its own STPs

we will provide an A-Link to support signaling and will charge the RLEC a price for the signaling service at or below the price it currently pays. The SS7 signaling should provide the full functionality that SS7 provides including but not limited to both ISUP and TCAP.

The parties agree to route and exchange bearer traffic at § 252(d)(2)-compliant price for all traffic. We propose use of the FCC's \$0.0007, but we could also use state-specific TELRIC based rates or a reasonable proxy. We might be willing to apply a non-cost based rate if it is reciprocal, e.g., the RLEC pays us the same price for traffic that originates on the RLEC's network and FeatureGroup IP pays the same price for traffic handed off to the RLEC for termination.

Feature Group IP will place or cause to be placed on every outbound call a unique non-geographic number (the initial numbers will come from the 500-888 NPA-NXX) that corresponds to an IP-enabled application (e.g., Xbox, Skype, a voice recognition IM service, a voice e-mail service).

Initially, no Legacy Feature Group D Carriers will be allowed to use the Feature Group IP Service. In the event that you believe an ordinary IXC is routing PSTN-originated traditional telephone toll calls via our network, simply open up a test or trouble ticket and we will track the call and report call detail to you so that you can bill access charges to the ordinary IXC.

We both agree to let the FCC monitor the parties' good faith efforts to resolve any technical or policy issue that arises.

Despite this proposal's resemblance to the FCC's past holdings and its recent proposed rules in the Intercarrier Compensation docket, NECA assiduously avoided engaging in any dialogue with FGIP, stating:

Finally, NECA appreciates your interest in resolving member companies' billing issues related to VoIP-originated calls terminating on the PSTN. Although we do not anticipate being able to "negotiate" a solution with FGIP at this time, we remain open to discussing ideas with you in the future regarding these matters.

As a consequence of these exchanges, NECA knows that FGIP does not participate in regulatory arbitrage or phantom traffic schemes. NECA uses phantom traffic, then, as the strawman to justify its unstated mission of protecting incumbent monopolies that comprise its membership.<sup>3</sup>

---

<sup>3</sup> E.g., Comments of the National Exchange Carrier Association, *et al* in WC Docket No. 07-256 "[T]here is widespread evidence that companies *such as* Feature Group IP continue to misuse the ESP exemption illegally to evade access charges for ordinary PSTN-to-PSTN calls." In fact, FGIP does not support "ordinary PSTN-to-PSTN" calls. FGIP provides service only in accord with its FCC-filed IGI-POP tariff, which sets out in detail what kinds of

Any prior or continued statements in the public forum that infer or imply that FGIP is or has engaged in illegal arbitrage or phantom traffic routing will result in legal action against NECA.

This letter further demands that NECA, its members and any person acting in concert with it take immediate steps to preserve all documents and electronic data related to FGIP, NECA's "DANA" group or any of its member employees, any communications within NECA's "DANA" group or any NECA members with respect a group boycott, conspiracy to restrain trade, the DANA initiative either in its present form or any similar initiative, for the time period from November 2006 to the present and any related matters concerning VoIP and/or LECs that provide PSTN connectivity to VoIP providers including but not limited to FGIP (the "Subject Matter"). For purposes of this notice, "Electronic Data" shall include, but not be limited to, all text files (including word processing documents), spread sheets, e-mail files and information concerning e-mail (including logs of e-mail history and usage, header information and "deleted" files), internet history files and preferences, graphical image format ("GIF") files, data bases, calendar and scheduling information, computer system activity logs, information generated as part of traffic exchange and all file fragments and backup files containing Electronic Data.

Please preserve and retain all Electronic Data containing any information about the Subject Matter. Specifically, please retain and preserve all backup tapes or other storage media, whether on-line or off-line, and refrain from overwriting or deleting information contained thereon, which may contain Electronic Data including but not limited to Electronic Data relating to any and all internal and external communications relating to the Subject Matter, including but not limited to communications regarding joint testing, interconnection, traffic exchange, facility and/or service orders, billing the processing and treatment of any disputes relating to the Subject Matter.

In order to alleviate any burden upon NECA, the undersigned is prepared to immediately enlist the services of a computer forensic expert to properly and non-invasively create back-up images all drives and media in the custody and control of NECA that may contain Electronic Data relevant to this matter. This can be accomplished through a stipulation setting forth a similar procedural framework outlined by the court in *Simon Property Group v. mySimon, Inc.*, 94 F.R.D. 639 (S.D. Ind. 2000), to ensure retention of all privileges while properly preserving and processing computer evidence as mandated by the court in *Gates Rubber Co. v. Bando Chemical Indus., Ltd*, 167 F.R.D. 90, 112 (D. Colo. 1996).


---

users may subscribe, the kind of traffic that can be supported and the signaling treatment that will be applied. We so advised you in our January and February 2008 correspondence.

Mr. Joe A. Douglas  
December 17, 2008  
Page 7

Should you have any questions or comments, please let me know.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Patricia B. Tomasco".

Patricia B. Tomasco

PBT/pk  
Cc: Mr. Lowell Feldman (via e-mail)